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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 408

SAFEWAY STORES INCORPORATED, *Petitioner*

v.

MICHAEL V. DISALLE,
Director of Price Stabilization

On Petition for a Writ of Certiorari to the Emergency Court of Appeals

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the Emergency Court of Appeals (R. 53) denying the petition for lack of jurisdiction was not accompanied by an opinion.

JURISDICTION

The order of the Emergency Court of Appeals was entered on October 9, 1951 (R. 53). The peti-

tion for a writ of certiorari was filed on November 1, 1951. The jurisdiction of this Court is invoked under Sec. 408(d) of the Defense Production Act of 1950 (64 Stat. 808, 50 U.S.C. App., Supp. IV, 2108(d)) and 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Emergency Court of Appeals has jurisdiction to issue a mandatory order to direct the performance of an act which already has been performed.

2. Whether the Emergency Court of Appeals has jurisdiction under the All-Writs Statute, 28 U.S.C. 1651, to order the issuance of procedural regulations to govern applications which may be filed in the future with the Director of Price Stabilization.

STATUTES INVOLVED

The provisions of the Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App., Supp. IV, 2061, et seq.) as amended by the Defense Production Act Amendment of 1951, approved July 31, 1951 (c. 275, Public Law 96, 82nd Congress, 1st Sess.) are set forth in pertinent part, *infra,* pp. 13-19.

STATEMENT

Petitioner, an operator of retail food stores (R. 7), seeks review of an order of the Emergency Court of Appeals denying for lack of jurisdiction its petition for an order commanding respondent (a) forthwith to grant or deny certain pending ap-

plications filed by petitioner with respondent, and (b) to issue procedural regulations providing for the expeditious processing of similar applications which may be filed in the future (R. 6).

1. *The Statutory Background.* Acting under Secs. 703 and 704 of the Defense Production Act of 1950[1] (64 Stat. 816, 50 U.S.C. App., Supp. IV, 2153, 2154, *infra,* p. 19), respondent,[2] on March 28, 1951, issued Ceiling Price Regulation 15 (hereinafter referred to as CPR 15) which covers retail stores of the type operated by petitioner[3] (16 F.R. 2735) (Pet. 2).

On July 31, 1951, the President approved the Defense Production Act Amendment of 1951 which added to Sec. 402 of the Act (64 Stat. 803, 50 U.S.C. App., Supp. IV, 2102) paragraphs 402 (d) (4) (the Capehart Amendment, *infra,* pp. 13-14) and 402(k) (the Herlong Amendment, *infra,* pp. 14-15). The amendments are concerned with the adjustment of ceiling prices to rising costs and with the maintenance of customary profit margins.[4]

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[1] 64 Stat. 798, 50 U. S. C. App., Supp. IV, 2061, hereafter referred to as the Act.

[2] The authority to issue this and other Regulations under the Act was delegated to respondent by Executive Order 10161, Part IV, Sec. 401(c) (15 F. R. 6105) and Economic Stabilization Agency General Order No. 2, Sec. 1(c) (16 F. R. 738).

[3] CPR 15 became effective April 5, 1951 (CPR 15, following Sec. 39(b)).

[4] Petitioner's contention is that the Capehart Amendment, phrased in very general language, is applicable to retailers. It is respondent's position that retailers are covered expressly and exclusively by the Herlong Amendment. The legislative

2. *The Proceedings Below.* On August 24, 1951 (R. 24), petitioner filed with the Office of Price Stabilization an application in which it requested the adjustment of the ceiling prices of its stores located in the Seattle, Washington, area pursuant to Sec. 402(d)(4) (the Capehart Amendment) or, in the alternative, an amendment of CPR 15 by the issuance of a Supplemental Regulation which would "fulfill the intent of Congress as expressed in Section 402(k)" (the Herlong Amendment) (R. 7, 11, 14). An amendment to this application was filed on September 7, 1951 (R. 21). Petitioner submitted twenty-one additional applications between August 28, 1951, and September 13, 1951 (R. 4).[5]

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history of the Defense Production Act Amendment of 1951 and of the proposed amendment of the Capehart Amendment (S. 2170) (R. 34-37) tend to support respondent's position that, since retailers are covered by the Herlong Amendment, they do not come under the Capehart Amendment. See also H. Rep. No. 1186, 82nd Cong., 1st Sess., pp. 4-5: "Sec. 402(d)(4) developed as a manufacturers' provision. Its pricing formulas are not applicable to all types of sellers. Wholesalers and retailers are covered in section 402(k). S. 2170 expressly makes the provision applicable to the sales of manufacturers, processors, and sellers of industrial services."

The overlap of the two Amendments and the ensuing ambiguity as to whether they are cumulative or mutually exclusive, render imperative the recourse to legislative history. *United States* v. *Dickerson*, 310 U. S. 554, 562; *United States* v. *Fisher*, 2 Cranch 358, 386.

[5] These 22 applications covered about one-half of petitioner's stores and one-tenth of the items covered by CPR 15 (R. 4). Three applications apparently were filed between September 13 and 24, 1951 (R. 50).

On September 17, 1951, petitioner filed with the Emergency Court of Appeals a petition (R. 1) asking for a writ commanding respondent (a) forthwith to grant or deny the pending applications for adjustment and (b) to issue procedural regulations providing administrative machinery for the expeditious processing of similar applications for adjustment which may be filed in the future (R. 6).

Respondent denied the applications on October 2, 1951 (R. 50)[6] on the grounds that the Capehart Amendment did not apply to sellers at retail (R. 50) and that the Herlong Amendment by its very terms operated only prospectively and did not require the revision of existing rules, regulations or orders (R. 51).[7] The Emergency Court of Appeals dismissed the petition on October 9, 1951, for lack of jurisdiction (R. 53).

On October 29, 1951, petitioner filed with respondent a protest against the order denying its applications. That protest was denied on November 29, 1951. This petition for a writ of certiorari was filed on November 1, 1951.

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[6] This order also disposed of the three applications filed between September 17 and September 24, 1951 (cf. R. 50).

[7] Respondent did not refer, in his objection to the petition (R. 26-40), to this denial of petitioner's application since the objections had to be filed by October 2, 1951 (R. 41), and respondent was not certain whether the denial of the application would be ready by that day. Petitioner, however, brought the denial of the application to the attention of the Emergency Court of Appeals (R. 42, 50-52).

ARGUMENT

Petitioner seeks a mandatory order directing respondent to do two things: (a) to grant or deny petitioner's pending applications for the adjustment of retail price ceilings, and (b) to issue procedural regulations for the expeditious handling of similar applications for adjustment which may be filed in the future (R. 6). It will be noted that petitioner does not ask for relief with respect to its alternative request for the issuance of an amendment of C.P.R. 15 pursuant to the Herlong Amendment (cf. p. 4, ***supra***).

1. Petitioner asks for an order directing respondent to grant or deny its pending applications for adjustment. Respondent issued such order on October 2, 1951 (*supra,* p. 5). This action left nothing to litigate as far as this branch of the petition is concerned. The act applied for was done and the controversy between the parties became moot *pro tanto.* No further proceedings could be had on this request of the petition and the petition was *pro tanto* properly denied for lack of jurisdiction. *Brownlow* v. *Schwartz,* 261 U. S. 216.

2. The second branch of the petition requests an order "to issue procedural regulations providing administrative machinery for the expeditious processing of similar applications for adjustment which may be filed in the future" (R. 6).

We submit that the Emergency Court of Appeals

properly held that it lacked jurisdiction to issue such order because: (a) the All Writs Statute, 28 U.S.C. 1651, on which petitioners rely, does not authorize such relief in respect of administrative proceedings which have never been and may never be filed; (b) the absence of the requested regulation has not impaired petitioner's recourse to the courts; and (c) petitioner actually asks for a peremptory writ of mandamus which is beyond the jurisdiction of the federal courts.

a. Petitioner invokes the jurisdiction of the Emergency Court of Appeals under 28 U.S.C. 1651, the All Writs Statute. (Pet. 9, 16). We submit that there are serious doubts as to whether 28 U.S.C. 1651 confers upon the federal courts a jurisdiction as extended as claimed by petitioner; in any event, in view of the facts of the case, there is no occasion for exercising it.

Basically, 28 U.S.C. 1651 grants to the federal courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions." Recent decisions of this Court indicate that, without regard to already existing jurisdiction, an appellate court may issue mandamus to correct action by an inferior federal court obstructing the right to appeal.[8] It should be noted,

[8] *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25, and authorities cited; *United States* v. *District Court*, 334 U. S. 258, 263; cf. *McIntire v. Wood*, 7 Cranch 504, 507; *County of Greene* v. *Daniel*, 102 U. S. 187, 195.

however, that the instances in which that power to remove obstacles to review has been exercised involve lower federal courts. It may be doubted whether this jurisdiction applies also to cases pending in administrative agencies. The question whether courts which have ultimate review over administrative determinations should inject their mandates into pending administrative proceedings raises serious practical considerations in view of the inherent differences between judicial and administrative procedures. Cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141.[9]

Moreover, petitioner has asked the Emergency Court of Appeals to exercise its powers under the All Writs Statute with respect to adjustment proceedings which have not even been filed as yet. It prays for a writ compelling issuance of regulations for the expeditious processing of "applications for adjustment which may be filed in the future". (R. 6.) We cannot perceive how the holdings in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, and *United States* v. *District Court*, 334 U. S. 258, concerned with proceedings pending in inferior federal courts, can be stretched to confer power upon

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[9] These considerations apply with special force to adjustment proceedings under the Defense Production Act. See R. 29-31.

the Emergency Court of Appeals to direct an administrative agency to issue regulations to govern applications which have not been and may never be filed with the agency.[10]

b. Petitioner also asserts that the absence of these regulations constitutes an obstacle to judicial review (Pet. 9, 16). The facts indicate that these fears are unfounded. Petitioner's applications for adjustment—including several filed after its petition had been submitted to the Emergency Court of Appeals (*supra,* p. 4, fn. 5)—have been passed upon by respondent. It has filed a protest from the denial of its applications, which has been denied (*supra,* p. 5). Thus, the door to judicial review is open to it. Sec. 408 of the Act (64 Stat. 808, 50 U.S.C. App., Supp. IV, 2108, *infra,* pp. 16-19). These denials of the applications and of the protest were based solely on the legal ground that, as a retailer, petitioner is not entitled to the adjustments under the Capehart Amendment. In any event, petitioner makes no showing that its ability to present any data or arguments supporting the requested adjustment was impaired by the lack of detailed regulations implementing the Capehart Amendment. Still less is there anything to indi-

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[10] *Safeway Stores* v. *Brown,* 138 F. 2d 278 (E. C. A.), certiorari denied 320 U. S. 797 (cf. Pet. 12, 16, 17) was concerned with a pending protest, not with adjustment applications which might be filed in the future.

cate that its right to judicial review has been impaired in any way by the absence of the requested regulations.

c. Petitioner pays lip service to the proposition that it is seeking this relief under the ancillary powers of the courts to issue mandatory orders to remove obstacles to appeal (Pet. 9). Actually, its argument is to the effect that respondent is under a duty to issue those regulations and that petitioner is suffering irreparable loss by respondent's failure to conform with his duty (R. 5; Pet. 8, 14-15). Thus, petitioner in effect asks for the issuance of an original writ of mandamus. It is well settled that the federal courts lack jurisdiction to issue this writ. (*Covington Bridge Co.* v. *Hager,* 203 U. S. 109, 110; *Knapp* v. *Lake Shore Ry. Co.,* 197 U. S. 536). Moreover, the issuance of the orders requested *pendente lite* or in an ancillary proceeding conflicts with Sec. 408(c) of the Act (64 Stat. 808, 50 U.S.C. App., Supp. IV, 2108(a), *infra,* p. 17) providing that the Emergency Court of Appeals "shall not have power to issue any temporary restraining order or interlocutory decree staying, in whole or in part, the effectiveness of any regulation or order relating to price controls issued under this title." The spirit, if not the words, of this provision applies with equal force to mandatory orders as it does to prohibitory injunctions.

On the merits, petitioner claims that respondent has failed to comply with his statutory duties under Secs. 407(a) and 704 of the Act (64 Stat. 807, 816, 50 U.S.C. App., Supp. IV, 2107, 2154, *infra*, pp. 15, 19) to issue the necessary implementary regulations. Sec. 407(a) provides that a protest is to be filed "in accordance with regulations to be prescribed by the President" (cf. Pet. 14). Comprehensive regulations governing the protest procedure are contained in Price Procedural Regulation 1, Secs. 30-61, originally issued in December 1950.[11]

Pursuant to Sec. 704 of the Act "the President *may* make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions" of the Act (cf. Pet. 8). The very terms of the statute indicate that this section merely confers on the President or his delegate (cf. Sec. 703 of the Act, 64 Stat. 816, 50 U.S.C. App., Supp. IV, 2153) a discretionary authority, not a peremptory duty, the compliance with which could be compelled by mandamus. Cf. *Decatur* v. *Paulding*, 14 Pet. 497.

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[11] Price Procedural Regulation 1 (P. P. R. 1) was originally issued effective December 18, 1950. (32A C. F. R., Ch. II, 15 F. R. 9055.) It has been revised effective May 26, 1951, 16 F. R. 4974.

CONCLUSION

The decision below is correct; there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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DECEMBER, 1951.

APPENDIX

The Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App., Supp. IV, 2061, et seq.), as amended by the Defense Production Act Amendments of 1951, approved July 31, 1951 (82nd Cong., 1st Sess., c. 275, Public Law 96) provides in pertinent part:

Sec. 402. * * * * * *

(d) (4) After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive. Nothing in this paragraph shall prohibit the establishment or maintenance of a ceiling price with respect to any material (other than an agricultural commodity) or service which (1) is based upon the highest price between January 1, 1950, and June 24, 1950, inclusive, if such ceiling price reflects adjustments for increases or decreases in costs occurring subsequent to the date on which such highest price was received and prior to July 26, 1951, or (2) is established under a regulation issued prior to the enactment of this paragraph. Upon application and a proper showing of his prices and costs by any person subject to a ceiling

price, the President shall adjust such ceiling price in the manner prescribed in clause (1) of the preceding sentence. For the purposes of this paragraph the term "costs" includes material, indirect and direct labor, factory, selling, advertising, office, and all other production, distribution, transportation and administration costs, except such as the President may determine to be unreasonable and excessive.

* * * * *

(k) No rule, regulation, order or amendment thereto shall hereafter be issued under this title, which shall deny to sellers of materials at retail or wholesale their customary percentage margins over costs of the materials during the period May 24, 1950, to June 24, 1950, or on such other nearest representative date determined under section 402(c), as shown by their records during such period, except as to any one specific item of a line of material sold by such sellers which is in short supply as evidenced by specific government action to encourage production of the item in question. No such exception shall reduce such customary margins of sellers at retail or wholesale beyond the amount found by the President, in writing, to be generally equitable and proportionate in relation to the general reductions in the customary margins of all

other classes of persons concerned in the production and distribution of the excepted item of material.

* * * * *

Sec. 407. (a) At any time within six months after the effective date of any regulation or order relating to price controls under this title, or, in the case of new grounds arising after the effective date of any such regulation or order relating to price controls, within six months after such new grounds arise, any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation or order may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the President. Within a reasonable time after the filing of any protest under this section, but in no event more than thirty days after such filing, the President shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the President denies any such pro-

test in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the President has taken official notice.

* * * * *

(d) Any protest filed under this section shall be granted or denied by the President, or granted in part and the remainder of it denied within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the President in disposing of his protest may petition the Emergency Court of Appeals for relief; and such court shall have jurisdiction by appropriate order to require the President to dispose of such protest within such time as may be fixed by the court. If the President does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period.

Sec. 408 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals specifying his objections and praying that the regulation or order protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the President, who shall certify and file with such court a transcript of such portions of the

proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the President has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation or order, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation or order may be modified or rescinded by the President at any time notwithstanding the pendency of such complaint. * * *

* * * * *

(c) The Emergency Court of Appeals is hereby continued for the purpose of the exercise of the jurisdiction granted by this title, with the powers herein specified, together with the powers heretofore granted by law to such court which are not inconsistent with the provisions of this title. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this title; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order relating to price controls issued under this title. The court shall exercise its powers and prescribe rules governing its pro-

cedure in such manner as to expedite the determination of cases of which it has jurisdiction under this title.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under this title, and of any provision of any such regulation or order. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order relating to price controls, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regula-

tions or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

Sec. 703. (a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies (and the President is hereby authorized to create such new agencies, other than corporate agencies, as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate. * * *

* * * * *

Sec. 704. The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act. Any regulation or order under this Act may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the President are necessary or proper to effectuate the purposes of this Act, or to prevent circumvention or evasion, or to facilitate enforcement of this Act, or any rule, regulation, or order issued under this Act. * * *

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